Supreme Court, U.S.
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No. 94-1483

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

City of Independence, Missouri;
Larry Kaufman, Acting City Manager,
City of Independence, Missouri;
William Carpenter, Mayor,
City of Independence, Missouri,

Petitioners,

v.

Robert E. Rinehart,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there an absence of "special and important reasons" for granting certiorari in this garden-variety, fact-intensive ADEA case that has not even been to trial, but merely involves necessary reversal of summary judgment based on universal law from this Court, and all circuits, that the *McDonnell Douglas* prima facie case framework is flexible and cannot be mechanically, rigidly applied to justify summary judgment at the "prima facie case" stage, because the district court erroneously believed a well-performing, 67-year-old replaced by someone 20 years younger (but also over 40) could not make the fourth element of a prima facie case?

2. Is there any "conflict" whatsoever posed by the Eighth Circuit's simple reversal of summary judgment – "given the facts of this case"; or is the Eighth Circuit decision in line with every circuit that has squarely addressed the issue and followed this Court's pronouncements that "prima facie" elements vary, are flexible, were never intended to be rigid, mechanized and ritualistic, so it should not be dispositive or fatal at the prima facie case stage if plaintiff's replacement also was in the protected group?

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Robert E. Rinehart,
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On Petition For Writ of Certiorari
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Western District

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert E. Rinehart respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's judgment which simply reversed and remanded the district court's grant of summary judgment on Rinehart's age discrimination claims.

STATUTES, AND RULES INVOLVED

In addition to 29 U.S.C. Section 623 (the "ADEA") set forth in petitioners' brief, the following rule is pertinent.

Rule 56, Federal Rules of Civil Procedure, provides in pertinent part as follows:

* * *

> **(c) Motions and Proceedings Thereon.** [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Petitioners omit nearly all of the relevant evidentiary record before the Eighth Circuit and district court. The following non-exhaustive recitation provides additional material facts bearing on the Eighth Circuit's holding that the district court erred in entering summary judgment at the "prima facie case" stage.

Petitioner Robert Rinehart, born April 7, 1925, was fired from his job as Independence Police Chief on his 67th birthday, after twelve years as chief, and "36 years of a perfect record with no reprimands, no bad evaluations," and

without ever having been "informed by Mr. Kaufman [then City Manager] or anybody that I was not doing the job that was expected of me." (Rinehart Depo., 35; AI-3). During open city council meeting, the very night before the Chief's unexpected termination, the Independence mayor (petitioner Carpenter) had told the public assemblage, "[T]he chief is getting old . . . ." (Kaufman, Ex. 4). Petitioner Kaufman gave *no reason or explanation whatsoever* at the time of termination, but kept repeating to the Chief: "It was his decision [the city manager's] and his decision alone." (Rinehart Depo., 83-84; AI-37-38).

Before plaintiff's sudden termination, however, Kaufman repeatedly had asked plaintiff when he "was going to retire, and he [Kaufman] indicated *he was going to replace me with a younger person.*" (Rinehart, 35; AI-3).[1] Kaufman attested by affidavit that he "immediately" followed through on his stated intentions to replace the Chief with a younger person:

> Immediately following my termination of Mr. Rinehart, I appointed Major Shannon Craven as the Acting Chief of Police, who continues to serve in that capacity to the present time . . . . Shannon Craven was born on October 2, 1944 and thus was 48 years old at the time of his appointment . . . .

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[1] Pages 34-35 of Rinehart's deposition are included as Respondent's Appendix.

(Kaufman Affidavit, AIV-657).[2]

Evidence before the district court established that respondent Rinehart progressed through the ranks and was named Chief of Police in October, 1980. (AIV-786). He served under a succession of city managers, and received nothing but positive praise for his performance. (Rinehart, 124-127; AI-61-64). According to the Chief, "During my tenure as a police officer for the City of Independence, including Chief of Police, I was evaluated annually, and my evaluation reflected what I was doing, always . . . . my evaluations reflected I was doing a good job." (Rinehart, 124; AI-61). Over the years, respondent Rinehart received continuous feedback from the city managers under whom he served as to the operations of the police department, any changes they felt might be beneficial to the department, etc., and he always was told he was doing a good job. (*Id.*, AI-62-63). In fact, just weeks before scheduled trial of this case, the city produced for the first time a written "Employee Rating" which Mr. Kaufman apparently gave Rinehart on September 2, 1991 – a mere six months before termination – in which plaintiff's overall rating was "**GOOD.**" (A III-494-496).

Record evidence established that petitioner William Carpenter was elected mayor in April, 1990 (AIV-786), Kaufman was named "Acting City Manager" in August, 1990

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[2] As noted by the Eighth Circuit, Shannon Craven was more than 19 years younger than respondent Rinehart.

(AIV-655), and, thereafter, Mayor Carpenter, newly elected councilman Ruhlman, City Manager Kaufman, and Assistant Manager Jim Harlow, all began hounding plaintiff as to "when I was going to retire, or how much longer I was going to work, or both." (Rinehart, 41-42, 70-71; AI-5-6, 28-29). Repeated inquiries occurred approximately "during 1991, and I may be off a little bit, but it's in that year before I was terminated." The Chief responded to "everybody that asked" that he "had no intention of retiring, that he liked his job, was in perfect health, and would work as long as he was able." (*Id.*, 131, AI-68).

After Kaufman became Acting City Manager, it was generally known around the city that five "older" department heads – all in their 60s, and including Rinehart – were going to be removed. (Rinehart Depo., 52-58; AI-11-16). At one city council session involving department heads and council discussing budget, Kaufman announced that "we" might have to fire some city employees, and "I'll guarantee you one thing, I'll start at the top." (Rinehart Depo., AI-12-14).

The five targeted department heads were Fire Chief Norman Birch; Police Chief Rinehart; Power & Light Director Parley Banks; Superintendent of Streets Bill Gore; and Parks and Recreation Director Bill Brewster. (Rinehart Depo., 57-60; AI-15-18). After Chief Rinehart's discharge, three of the five heads were gone: Kaufman fired Banks February 6, 1991, at which time Banks was "oldest of all the city . . . departmental directors." (Banks Affidavit, AII-440-443); in 1991, Kaufman told Rinehart he wanted to terminate

Fire Chief Birch, and asked Rinehart to take over voluntarily both the police and fire departments under a new title, which plaintiff declined. (Rinehart, 50-51; AI-10A-10B). Chief Birch wrote a letter to defendant Kaufman, dated August 30, 1991, that refers to his being "forceably [sic] removed from my position," and objects to the city "Forcing me out of my position at my age . . . ." (A II-444). The district court also had before it testimony by Assistant Chief Gary George that Captain J. E. Barnett also believed the city was forcing him to retire: "He [Barnett] felt he was being forced to retire and he was going to fight it." (George, 161; AII-324). A memo written by Captain Barnett stated in pertinent part: "[T]he city is taking a position that when a police employee reaches age 55 and becomes eligible for retirement, they are no longer considered under the merit system . . . . Since I will be eligible for retirement in January, 1992, the city made the decision to eliminate my position." (AII-445).

Evidence also included respondent Rinehart's testimony that on April 6, 1992, the day before his discharge, the mayor said "in open council to the public that I was too old for the job." (Rinehart Depo. 71; AI-29). A partial transcript of the Council meeting confirms the Mayor's comment regarding the crowd getting a little bit out of hand: "Besides that, *the Chief is getting old* and I don't think he could control all of them tonight." When asked whether Mayor Carpenter was "joking," Chief Rinehart testified: "I didn't take it as a joke, and I don't take it as a joke today. It is my livelihood he is talking about . . . . because he is talking about my being able to do my job . . . . and I was

terminated the next day." (Rinehart Depo., 75; AI-33).

On April 7, 1992, petitioner Kaufman called plaintiff Rinehart away from his monthly staff meeting at 3:00 p.m., and told him, "I'm going to terminate you." Plaintiff asked, "For what reason?" Mr. Kaufman said only, "It's my decision and my decision alone." Rinehart testified, "There was no issue made on which Mr. Kaufman said, 'This is the reason I had to terminate you, or anything like that.'" (Rinehart, 87-88; AI-41-42). Only *after* plaintiff filed his charge of age discrimination did the City first mention that performance supposedly played a role in plaintiff's termination. The "City's Position Statement," filed May 22, 1992 with the EEOC, for the first time alleges Rinehart "was dismissed by the City for failure to carry out his duties as police chief in a competent manner," setting forth four specific areas.

In summary judgment proceedings, neither defendant nor the district court addressed, relied on, *or even reached* the legally crucial "reasons" for discharge. Contrary to law of this Court, and all of the circuits addressing the subject, the district court expressly refused to reach or consider plaintiff's evidence that the reasons for discharge were false and pretextual, and, instead, rendered summary judgment a mere four (4) days before trial, on the solitary, erroneous ground that plaintiff's case could be stopped at the "prima facie case" stage, which the court held required a showing on the "fourth element" that he was replaced by someone under 40. The Eighth Circuit reversed "given the facts of this case."

The Eighth Circuit's unanimous decision properly reversed summary judgment, on the unremarkable but correct bases that: "the district court erred to the extent it required Rinehart to demonstrate as part of his prima facie case that his replacement came from outside the protected class of workers age 40 or above (App. A-6); and "because there is agreement that this is not a reduction-in-force case, we can conclude that the district court erred by requiring Rinehart to make an additional showing that age was a factor in his termination as part of his prima facie case" (A-8). Because the district court entered summary judgment on an erroneous legal premise that the *McDonnell Douglas* prima facie case framework could be rigidly applied so as to become case dispositive, the Eighth Circuit simply and properly held that a legal error had occurred and the case was remanded for further proceedings.

REASONS FOR DENYING THE WRIT

I. THIS SIMPLE, FACT-BASED REVERSAL OF SUMMARY JUDGMENT PRESENTS ABSOLUTELY NO "SPECIAL AND IMPORTANT REASONS" FOR REVIEW BY THIS COURT. INSTEAD THE EIGHTH CIRCUIT WAS COMPELLED BY THIS COURT'S, AND ITS OWN, PRECEDENTS, TO REVERSE SUMMARY JUDGMENT, BECAUSE THE DISTRICT COURT ERRONEOUSLY RENDERED SUMMARY JUDGMENT ON THE

SOLITARY, ERRONEOUS PREMISE THAT A 67-YEAR-OLD PLAINTIFF REPLACED BY A 48-YEAR-OLD COULD BE BARRED FROM PROCEEDING FURTHER BECAUSE THE FOURTH ELEMENT OF THE PRIMA FACIE SHOWING "REQUIRED" REPLACEMENT "OUTSIDE THE PROTECTED GROUP" OR "AN ADDITIONAL SHOWING" THAT AGE WAS A FACTOR.

1. The Eighth Circuit's holding in *Rinehart* is absolutely faithful to repeated, consistent pronouncements tracing back to *McDonnell Douglas*, that the "prima facie" framework "is not onerous," was "never intended to be rigid, mechanized, or ritualistic," but was meant "only to aid courts and litigants" to "evaluate evidence in light of common experience" so as to "sharpen the inquiry into the elusive factual question of intentional discrimination."

The Eighth Circuit announces no ground-breaking law; there is no constitutional issue; there is no conflict with other circuits. In short, there is no "special and important" reason for this Court to review the opinion, most particularly because the Eighth Circuit accurately applies law of this Court in existence since the "allocation" and "order of proof" paradigm first emerged 22 years ago.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), this Court set forth a simple framework for "the order and allocation of proof" in a Title VII case

alleging discriminatory treatment. Plaintiff's "initial burden" is accomplished merely "by showing":

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that, despite his qualifications he was rejected;
(iv) that, after his rejection, *the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.*

411 U.S. at 802, 93 S.Ct. at 1824. *Rinehart* fulfills the fourth element. Moreover, in *McDonnell Douglas*, this Court noted what has now been repeated in hundreds of appellate decisions: "The *facts necessarily will vary* in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* n. 13 (emphasis added).

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943 (1978), this Court again repeated that element 4 could be met if "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[3] In *Furnco*, this Court reemphasized the prima facie framework "was not intended to be an inflexible rule," clarifying as follows:

The method suggested in *McDonnell Douglas*

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[3] In Rinehart, that's precisely what happened.

> for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.

438 U.S. at 577; 98 S.Ct. at 2949-50. This Court in *Furnco* emphasized what petitioners here ignore:

> *A McDonnell Douglas prima facie showing is not the equivalent of a factual finding of discrimination, however.* Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations.

Id. at 579 (emphasis added).

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981), this Court announced a rule ignored by petitioners and the district court which has

been repeated routinely, and most certainly supported reversing summary judgment here: "The burden of establishing a prima facie case of disparate treatment is not onerous." *Id.*, 101 S.Ct. at 1094.

In *Burdine*, the Court clarified that the simple function of the prima facie framework is not as a test for "submissibility" (as petitioners fundamentally misperceive), but merely to force the employer's explanation because "it eliminates the most common non-discriminatory reasons for the plaintiff's rejection," i.e. lack of qualifications, or lack of an available position.[4] *Burdine* clarified that the prima facie showing merely required the employer to "explain" the reason for discharge. Again, this Court emphasized that the prima facie standard was "not inflexible," that it "will vary" according to "differing factual situations," *Id.*, n. 6. But if the employer is silent in the face of the prima facie showing and the inference it creates, "the Court must enter judgment for plaintiff because no issue of fact remains in the case." *Burdine*, 101 S.Ct. at 1094.

In *U. S. Postal Service Board of Governors v. Aikens*, 360 U.S. 711, 103 S.Ct. 1478 (1983), this Court reviewed its previous decisions, and repeated the admonition that *McDonnell Douglas* "was never intended to be rigid, mechanized or ritualistic." 103 S.Ct. at 1482. This Court also gave this directive to district courts, in explaining the limited role of the prima facie framework:

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[4] *Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977).

> Nor should they [district judges] make their inquiry even more difficult by applying legal rules which were *devised to govern 'the basic allocation of burdens and order of presentation of proof,' Burdine*, 450 U.S. at 252 . . . in deciding this ultimate question.

103 S.Ct. at 1482 (emphasis added). Ruling precisely as the Eighth Circuit was forced to do with respect to the district court's erroneous "focus" on the prima facie case below, this Court held the district court "erroneously focused on the question of prima facie case rather than directly on the question of discrimination." 103 S.Ct. at 1483.

In *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 108 S.Ct. 2777 (1988), Justice O'Connor reviewed prior law regarding the "prima facie case" and its purpose of "progressively sharpening the inquiry" into the "elusive factual question" of intentional discrimination. Significantly, this court again described prima facie principles one sees embodied and adhered to in the *Rinehart* decision:

> Under that scheme, *a prima facie case is ordinarily established* by proof that the employer, after having rejected the plaintiff's application for a job or promotion, *continued to seek applicants with qualifications similar to the plaintiff's* . . . the *burden of proving a prima facie case is not onerous* . . . and the employer in turn may rebut it simply by

> producing some evidence that it had legitimate, nondiscriminatory reasons for the decision.

108 S.Ct. at 2784 (emphasis added). Once again, this Court emphasized what petitioners should know but cannot acknowledge: "We have cautioned that the shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence," while the burden of persuasion remains with the plaintiff. *Id.*

St. Mary's Honor Center v. Hicks, ___U.S.___, 113 S.Ct. 2742 (1993) is this Court's most recent in-depth analysis of the *McDonnell Douglas* test. The Eighth Circuit holding and citations in *Rinehart* follow this Court's reiteration that the *McDonnell Douglas* formulation provides "minimal requirements" which create nothing more than "an initial rebuttable presumption," requiring the employer to give "reasons for its actions." *Id.* at 2747, 2751. Indeed, in contrasting how the factual inquiry "proceeds to a new level of specificity "after (1) a prima facie showing is made, (2) the employer articulates a legitimate explanation, and (3) plaintiff moves to proving the reasons are a pretext for discrimination, this Court characterizes the prima facie framework as mere "generalized factors":

> But the 'new level of specificity' may also (as we believe) refer to the fact that the inquiry now turns *from the few generalized factors that establish a prima facie case* to the

> specific proofs and rebuttals of discriminatory motivation the parties have introduced.

113 S.Ct. at 2752 (emphasis added). As recently as 1993, after 20 years with *McDonnell Douglas*, this Court again re-emphasized: "The *McDonnell Douglas* methodology was never intended to be rigid, mechanized or ritualistic." 113 S.Ct. at 2753. It is but "a *procedural* device, designed only to establish an order of proof and production." *Id.* at 2755 (italics in original).

In sum, against more than 20 years of established law from this Court, it defies credulity for Petitioners to assert that the Court of Appeals' ruling in this case somehow enables a terminated plaintiff to "get to the jury" without adducing any proof whatsoever of discriminatory animus. The "prima facie" case framework, properly applied, merely forces the defendant to explain itself – a stage the district court erroneously never reached. Thus the Eighth Circuit had no choice under this Court's precedents, as well as its own, but to reverse and remand for further proceedings.

2. There is no "conflict" among the Circuits that have squarely addressed the issue and uniformly held that the minimal requirements of a prima facie case do not require as a "bright-line" rule that the plaintiff must show he was replaced by someone outside the protected class or make "some additional showing" in a non-reduction-in-force termination.

Although *McDonnell Douglas* was a Title VII hiring case, its prima facie framework has been modified and adapted to other discrimination contexts. It will be apparent the Eighth Circuit's holding that the last element of a prima facie case is flexible, and may be met in a non-reduction-in-force context by showing plaintiff was replaced by someone sufficiently younger, is not only the "predominant" view, but nearly a unanimous view:

- **1st Cir.**: A Title VII plaintiff can "make out the fourth element of a prima facie case without proving that her job was filled by a person not possessing the protected attribute," but need only show the employer had "a continued need for someone to perform the same work after [the complainant] left." *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (5th Cir. 1990); *Sanchez v. Puerto Oil Company*, 37 F.3d 712, 719 (1st Cir. 1994) – ADEA plaintiff need only show that the employer sought a replacement with roughly equal qualifications: "The prima facie case requirement embodies a concept, not a mechanical exercise. Though its contours generally follow the *McDonnell Douglas* model, a prima facie case must be custom tailored to fit both the particular animus . . . and a particular type of employment decision involved . . . ." It is "not onerous."

- **2d Cir.**: *Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir. 1985) *cert. denied*, 474 U.S. 829 (1985). Title VII case requiring plaintiff to show replacement was outside of the protected class "is inappropriate and at odds with the

policies underlying Title VII"; *Lowe v. Commack Union Free School District*, 886 F.2d 1364, 1372 (2d Cir. 1989) (ADEA plaintiff could not prevail on a *disparate impact* claim where employees who were treated more favorably were also in the protected age group, but the Court expressly stated that "there is nothing to prevent" plaintiff from prevailing on a *disparate treatment claim* on the same facts); *Benjamin v. United Merchants and Manufacturers, Inc.*, 873 F.2d 41, 42 (2d Cir. 1989) (ADEA verdict affirmed for a 62-year-old plaintiff replaced by a 41-year-old); *Cronin v. Aetna Life Ins.*, 46 F.3d 196, 204-05 (2d Cir. 1995): The showing the plaintiff must make as to the elements of the prima facie case in order to defeat summary judgment is *'de minimis.'"*

- **3d Cir.**: ADEA case, *Maxfield v. Sinclair International*, 766 F.2d 788, 792 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986):

> Courts that have addressed this issue squarely have universally permitted a prima facie case to be shown through proof that the favored person was younger than plaintiff. All have held that the replacement need not be younger than 40, the age at which ADEA protection begins . . . . [citations from 5th, 6th, 11th, and DC omitted]
>
> Policy considerations support holding that a prima facie case may be established through proof of replacement by a younger person. *If*

> *no intra-group protection were provided by the ADEA, it would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience, since even an employer with clear anti-age animus would rarely replace them with someone under 40.*[5]

Armbruster v. Unisys Corporation, 32 F.3d 768, 777 (3d Cir. 1994) a RIF case in which the Third Circuit recognized that in a "typical ADEA pretext case," the fourth element is met if plaintiff is replaced "by a person sufficiently younger to permit an inference of age discrimination." Consistent with Eighth Circuit decisions, only reduction-in-force cases require modification of the "ordinary" prima facie framework, because plaintiff is not "replaced" but can show as the fourth element that he was laid off while other "unprotected workers were retained."

- **4th Cir.**: ADEA, *Lovelace v. Sherwin-Williams Company*, 681 F.2d 230, 237-38 n. 5 and 242 n. 13:

> As indicated, see note 5, an ADEA claim involving replacement by another *does not require as a matter of law proof that the other was outside the protected age group. But absolute and relative ages of the claimant and*

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[5] Id. at 792 (emphasis added). This statement of ADEA policy considerations accurately describes why "intra-group protection" is necessary for a 67-year-old Chief of Police.

> *his replacement have obvious relevance in assessing whether a factual inference of age discrimination is permissible.* We agree with the First Circuit that replacement of a 60-year-old by a 35-year old, or even a 45-year-old within the protected class would be more suggestive of discrimination than replacement of a 45-year-old by a 42-year-old within the protected class, or a 39-year-old outside it.[6]

(emphasis added); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 992 (4th Cir. 1987), *cert. denied*, 44 U. S. 913 (1987) (citing fourth element in non-RIF ADEA discharge case as requiring that after plaintiff's rejection, "the position remained open and the defendant continued to seek or accept applications from persons of her qualifications.")

- **5th Cir.**: ADEA case, *Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988):

> A prima facie case of age discrimination can be constructed where the plaintiff was replaced by a younger worker, even if the younger worker is himself within the protected class .... Such a showing is not, however, necessarily sufficient to prove a prima facie

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[6] Of course, the "bright-line" test petitioners advocate would allow the nonsensical result that a 41-year-old replaced by a 39-year-old would make the "fourth element," whereas a 70-year-old replaced by a 40-year-old could not.

> case. *The ADEA does not lend itself to a bright-line age rule* and in this respect differs from racial or sex discrimination cases, in which replacement by a worker outside the protected category is a convenient proof guideline. [emphasis added]

Fields v. J. C. Penney, Inc., 968 F.2d 533 (5th Cir. 1992) (the fourth element can be replacement by someone outside the protected class, or by someone younger, or other evidence of discharge because of age). In *Walther v. Lone Star Gas Company*, 952 F.2d 119 (5th Cir. 1992), the court held that plaintiff's replacement by an older worker during a RIF was not dispositive against plaintiff, but that plaintiff's "entirely circumstantial evidence" was "sufficient to support the jury's verdict." *Id.* at 123.

- **6th Cir.**: ADEA cases, *Barnes v. Gencorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990), *cert. denied*, 498 U.S. 878 (1990) held: "An employer violates ADEA when preference is given to a younger employee, *even if the younger employee is within the protected class of persons age 40 and over*"; *Manzer v. Diamond Shamrock Chemicals*, 29 F.3d 1078, 1081 (6th Cir. 1994): "a prima facie case has been shown where the plaintiff was replaced by someone younger, even though that person may still be within the protected class";

- **7th Cir.**: *Kralman v. Illinois Department of Veteran Affairs*, 23 F.3d 150, 155 holds:

> Indeed, it is considered hornbook law that the ADEA action can be based on discrimination between older and younger members of the protected class.

Reviewing all authorities that have squarely addressed the issue, the Seventh Circuit concluded:

> Based upon these authorities, we find that the district court erred in holding, as a bright-line test, that the plaintiff could not prove a *prima facie* case because the person who was ultimately hired for the job was 46 and, therefore, also a member of the protected class. We recognize there may be some circumstances in which a court may find that the difference in ages between the plaintiff and the favored employee are not sufficient to create a reasonable inference of age discrimination. However, in this case, the plaintiff, at age 71, was of an entirely different generation than the employee who was ultimately hired for the position. We, therefore, find that the plaintiff's evidence would satisfy the prima facie requirements under the ADEA.

23 F.2d at 155-156.

- **8th Cir.**: *Rinehart v. City of Independence*, 35 F.3d 1263 (8th Cir. 1994); *Hillebrand v. M-Tron Industries,*

Inc., 827 F.2d 363, 366, n. 6 (8th Cir. 1987), holding "A plaintiff need not be replaced by a person outside the protected age group to make out a prima facie case under the ADEA"; *Davenport v. Riverview Garden School District*, 30 F.3d 940, 944-45 (8th Cir. 1994); *Williams v. Ford Motor Company*, 14 F.3d 1305, 1308 (8th Cir. 1994); *Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 558 (8th Cir. 1989) – all holding under Title VII that district courts erroneously had required plaintiff to show replacement by someone outside the protected class in order to establish the fourth element of a prima facie case. In *Walker*, an ADEA and sex discrimination case, the Eighth Circuit found the trial court "placed inordinate reliance upon its finding that she [plaintiff] was replaced by a female." 881 F.2d at 558. The Court observed:

> Nevertheless, it is entirely conceivable that a woman discharged and eventually replaced by another woman may be able to establish that she was the object of impermissible discrimination related to her gender . . . . The ultimate inquiry in any Title VII suit is whether the plaintiff has established that a prohibitive factor played a determinative role in the employer's decision . . . and while we agree with the district court's ultimate conclusion that Walker failed to make such a showing, we also express some agreement with Walker's contention that *the sex of her replacement, although a relevant consideration, is not*

> *necessarily a determinative factor in answer to either the initial inquiry of whether she established a prima facie case, or the ultimate inquiry of whether she was the victim of discrimination.* [emphasis added]

Only in reduction-in-force cases has the Eighth Circuit modified the fourth element of the prima facie case to include replacement by someone outside the protected class, or "some additional showing" that age played a role in the discharge. *Kehoe v. Anheuser Busch, Inc.*, 995 F.2d 117, 119 (8th Cir. 1993); relying on *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985); *Banks v. City of Independence*, 21 F.3d 809 (8th Cir. 1994) (a RIF/consolidation case in which summary judgment was affirmed based on the totally distinguishable facts of *Banks*; the fact the district court in *Banks* properly reached and resolved the pretext issue and the ultimate question of discrimination; after which the Eighth Circuit "examined all of the exhibits submitted" and conducted "independent consideration of all the evidence" before concluding that *Banks* "failed to establish the existence of a genuine issue of material fact with respect to any discriminatory intent on the part of the city.")

- **9th Cir.**: *Douglas v. Anderson*, 656 F.2d 528, 532-33 (9th Cir. 1981) (in ADEA discharge case prima facie case normally met if replaced by "substantially younger employee," but replacement "by even an older employee" may suffice); *Breitman v. May Company-California*, 37 F.3d 562, 565 (9th Cir. 1994) (same).

- **10th Cir.**: *Ingels v. Thiokol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994) (fourth element in non-RIF, ADEA discharge case met by showing replacement by "a younger person").

- **11th Cir.**: *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985) holding that a "mechanistic approach" for proving a prima facie case of age discrimination is "frequently inappropriate because it ignores the basic realities of this form of discrimination." The Court continues:

> Age discrimination is qualitatively different from race or sex discrimination in employment, because the basis of the discrimination is not a discrete and immutable characteristic of an employee which separates the members of a protected group indelibly from persons outside the protected group. *Rather, age is a continuum, along which the distinctions between employees are often subtle and relative ones.* Nevertheless, age differences may be very real distinctions from the perspective of an employer, for whom an employee's age is a constantly shifting factor in the determination of his worth to the company.

758 F.2d at 1442 (emphasis added). The "realities of the work place" require intra-group protection, for reasons rooted

in unassailable logic, common sense, and long-established legal policy that applies precisely to the *Rinehart* decision:

> Seldom will a 60-year-old be replaced by a person in their 20s. Rather, the 60-year-old will be replaced by a 50-year-old, who, in turn, is succeeded by a person in their 40s, who also will be replaced by a younger person. Eventually, a person outside the protected class will be elevated, but rarely to the position of the one fired . . . . Because the discrimination involves age, rather than sex or race, a requirement that the replacement be from a non-protected group fails to take the reality of the work place into account. *Because of the value of experience, rarely are 60-year-olds replaced by those under 40.* The replacement process is more subtle, but just as injurious to the worker who has been discharged. That the person is replaced by a person 10 years younger, rather than 20 years, does not diminish the discrimination; the subtlety only tends to disguise it.

Goldstein at 1442-43 (quoting *McCorstin v. United States Steel Corporation*, 621 F.2d 749, 754 (5th Cir. 1980)). Goldstein was 60 years old, replaced by a 46-year-old, and the Court concluded that "Goldstein presented sufficient evidence to satisfy the discrimination prong of his prima facie case of age discrimination, even though the employee who

replaced him was himself within the protected age group." Id. at 1444. *Carter v. City of Miami*, 870 F.2d 578, 583 (11th Cir. 1989) (a 49-year-old plaintiff whose replacement was 46 years old established "fourth prong" of prima facie case of age discrimination); *Corbin v. Southland International Trucks*, 25 F.3d 1545 (11th Cir. 1994), in which the court reversed summary judgment in an ADEA case, expressly cited *Carter* and *Goldstein* with approval, holding as follows:

> Plaintiffs commonly seek to satisfy this third prong [of the prima facie case] by proving that the employer replaced them with a younger employee. Unlike race and sex discrimination cases, the plaintiff in an age discrimination [case] need not necessarily prove that his replacement was outside the protected class, that is, under 40 years of age. The plaintiff in an age discrimination case may establish a prima facie case merely by establishing that his replacement was younger than he, provided that the discrepancy between the ages, along with any other relevant evidence, is sufficient that a factfinder could reasonably infer age discrimination.

Id. at 1549 (emphasis added).

- **D.C. Cir.**: *Hamen v. National Academy of Sciences*, 23 F.3d 535 (D.C. Cir. 1994) (although the court states without analysis that the fourth element of the prima

facie case involves replacement from outside the protected class, the case cited in support is *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982), a decision by Judge Skelly Wright, who describes the fourth element as "(4) was disadvantaged in favor of a younger person." *Id.* at 857.

As the foregoing analysis of Circuit decisions clearly shows, there is uniformity (and near unanimity), rather than "disarray" or "divergence" among circuits. And where petitioners refer to "intra-circuit conflict," in reality any such "differences" are explained by (1) each Court's proper modifications for different cases (such as reductions) and (2) appropriate adherence to this Court's admonitions that the prima facie test is meant to be "flexible" and to "vary" according to the facts of a particular case.

Nothing more than a passing comment is needed to shoot down petitioners' unique suggestion that it is somehow aberrant that different cases, decided on two different sets of facts, based on two different sets of evidentiary submissions, submitted to two different judges, could cause different results – affirmance of summary judgment (*Banks v. City of Independence*); and reversal (*Rinehart*). Petitioners' suggestion that separate ADEA claims made by two individuals must, ipso facto, reach the same result has no support in fact or law. Likewise fanciful is Petitioners' unsupported assertion that the "panel in Rinehart viewed almost identical facts" as *Banks*, but reached a different conclusion only because it applied a different test. Nonsense. Just to illustrate factual differences, Chief Rinehart testified to direct

evidence of age discrimination – i.e. Kaufman repeatedly asked plaintiff when he "was going to retire and . . . indicated he was going to replace me with a younger person" – a material fact unique to Rinehart.

CONCLUSION

This case deserves and requires a trial, as the Eighth Circuit has mandated. The Eighth Circuit's decision that the district court erred by requiring plaintiff as a matter of law to show replacement outside the protected age group or make some additional showing of age discrimination as part of his prima facie showing is absolutely consistent with law of this Court and other circuits. The Eighth Circuit opinion engages in careful, scholarly analysis, firmly supported by its own precedents and this Court's commands. Respondent Robert Rinehart respectfully requests that this Court deny the Petition for Writ of Certiorari, because this case presents no issue appropriate for this Court's review.

Respectfully submitted,

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PAGES 34-35 OF DEPOSITION
OF ROBERT E. RINEHART
Taken April 27, 1993

* * *

Q. Before we talk about your meeting with Mr. Kaufman on the 7th of April, let me ask you this: Why do you believe you were fired?

A. Because I was too old. I had been there too long and I was too old and other circumstances involving that led me to believe that I was fired because of my age, because I was in perfect health, and I had passed the firearms testing, and I had qualified for firearms, and there no apparent reason for my dismissal.

Q. We'll come back to that part in a minute. When you say that you believe you were fired because you had been there too long, what do you mean by that?

A. I was an older employee, and it was my belief that I was removed because of my age. And, of course, my age reflected my tenure of service also, but there was movement in the City to move the older department heads out of the City and replace them with younger department heads. And there was a lot of talk about it being done [Pg. 35] while I was there. And the conversation that I was asked by Mr. Kaufman, the time when I was going to retire, and he indicated he

was going to replace me with a younger person. I asked him for a reason for my termination and he wouldn't give me a reason for it, he said it's his decision and his decision alone. (emphasis added).

Q. We'll come back to those in a minute. Other than your age, do you think there was any other reason related to your termination?

A. No, I had 36 years of a perfect record with no reprimands, no bad evaluations. I had not been informed by Mr. Kaufman or anybody that I was not doing the job that was expected of me, and I felt I was very competent in my job.

Q. So, as you sit here today, you believe that the only reason for your termination was your age?

A. Yes, I know that for a fact in my own mind.

Q. Do you believe that politics had anything to do with your termination?

A. I don't believe that politics would cause my termination.

* * *